IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

THE DETROIT EDISON COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF OF PETITIONER

JOHN A. McGUINN
FARMER, SHIBLEY, McGUINN & FLOOD
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

LEON S. COHAN
2000 Second Avenue
Detroit, Michigan 48226

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OPINIONS BELOW

The opinion of the Court of Appeals, dated August 10, 1977, is reported at 560 F.2d 722, and appears in the Appendix to the Petition for a Writ of Certiorari [1] at pp. 1a-12a. The Court's denial on November 22, 1977, of the petitioner's motion for rehearing appears in the Petition Appendix at p. 13a. The decision and order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 218 NLRB No. 147 (1975), and appears in the Petition Appendix at pp. 14a-17a. The decision of the Administrative Law Judge in this case appears in the Petition Appendix at pp. 18a-59a. The original opinion and award of the arbi-

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[1] The references to the Appendix to the Petition for Certiorari will be designated as "P.A." in this brief, while references to the Appendix prepared after the petition was granted will be designated as "A".

trator in the related arbitration proceeding, dated December 3, 1973, appears in the Petition Appendix at pp. 60a-76a, and the supplemental opinion and award of the arbitrator in that proceeding, dated October 22, 1974, appears in the Petition Appendix at pp. 77a-87a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 10, 1977. A timely petition for rehearing *en banc* was denied on November 22, 1977, and the petition for certiorari was filed within 90 days of that date. This Court granted the petition on March 27, 1978. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the judicial interpretation of Section 8(a)(5) of the National Labor Relations Act requiring employers to furnish unions representing their employees with tests and test scores conflicts with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(h)) and the guidelines of the Equal Employment Opportunity Commission on testing (29 C.F.R. Part 1607), which require, *inter alia,* that such tests and test scores not be divulged to unauthorized persons.

2. Whether Section 8(a)(5) of the National Labor Relations Act requires employers to furnish unions representing their employees with copies of tests and test scores used by employers in the selection of candidates for jobs requiring the aptitude to learn specific skills in circumstances where (1) the employer gave or offered to give the Union sufficient information to determine the validity of the tests, (2) the uncontradicted

expert testimony of the professional psychologists was that disclosure of the actual test questions to the Union would not be useful in determining the validity of the tests, and (3) the arbitrator involved in the grievance giving rise to this case, in construing the applicable collective bargaining agreement, found that production of the actual test battery was irrelevant to the arbitration proceeding and award.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> "Section 158(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

United States Code, Title 42:

> "Section 2000e-2(h) . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The EEOC Guidelines on Employee Testing are found at 29 C.F.R. Part 1607, and are reproduced in the Petition Appendix at pp. 88a-100a.

STATEMENT

Background

The Detroit Edison Company is a public utility engaged in the generation and distribution of electric

power in the State of Michigan (P.A. 19a). Since about 1943, the Utility Workers Union of America (Local 223), AFL-CIO, has represented certain employees of the Company. At the time of the hearing in this case, that Union represented employees in approximately 28 different appropriate units throughout the Company (P.A. 19a). One of these 28 units was a unit of operating and maintenance employees at the Company's then newly constructed Monroe Power Plant at which the Union was certified as exclusive bargaining agent on April 1, 1971 (P.A. 19a-20a). The Company and Union thereafter agreed that the Monroe Plant employees would be covered by the terms and conditions of a preexisting agreement between the parties effective from June 16, 1969, to June 12, 1972 (P.A. 20a).

In late 1971, the Company determined that six positions in the classification of Instrument Man B should be filled at the Monroe Power Plant. The job description of the Instrument Man job reveals that an incumbent on this job "installs, maintains, repairs, calibrates, tests and adjusts precision instruments in power plants" (A. 358.) This includes automatic control systems which control boilers and their associated equipment and the maintenance of both mechanical and electrical tripping and alarm devices (A. 358-359). The job description also states that, "Fairly frequent opportunity to cause extremely serious operating conditions from misjudgment or erroneous action exists" (A. 359-360). As Mr. Kanous testified, the Instrument Man is a "key" job in the plant and is "extremely important to the plant's operation, both in staying in operation and operating efficiently when it is in operation" (A. 210), and that he has the responsibility "to actually keep that system on the line or put it back

essentially without assistance" (A. 212). He further testified that the Instrument Man "can create situations which are extraordinarily hazardous to other employees or the equipment that he's working on" (A. 310). For the foregoing reasons, as found by the Administrative Law Judge, the Company considers this to be a critical job "because it is involved with maintenance of plant instrumentation, vital to the operation of the plant . . . ." (P.A. 20a).[2]

The posted requirements for this job were (1) satisfactory high school credits for 2 years of math and 1 year of science, (2) a satisfactory physical examination, (3) a minimum of "recommended" in the required Instrument Man aptitude test administered by the Company, and (4) a satisfactory attendance record (P.A. 20a).

Ten Monroe plant employees bid for the job, but all were rejected because they failed to achieve a "recommended" score on the battery of aptitude exams. Over 30 employees from other plants covered by the Union contract were then considered. One incumbent instrument man from another location was selected without the necessity of taking the test, and the remaining five positions were filled by the five most senior applicants who achieved a "recommended" score on the aptitude tests (P.A. 21a).

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[2] Likewise, the arbitrator in the arbitration proceeding concerning the Union's grievance over the Company's failure to promote the Monroe Plant applicants, found that "There is no question that the Instrument Man job is one of critical importance and requires long training" (P.A. 71a).

The Grievance

On January 17, 1972, the Union filed a grievance claiming a violation of Article VIII, Section 38 of the collective bargaining agreement over the failure to award the Instrument Man job to the Monroe Plant bidders (A. 120). Article VIII, Section 38, of the agreement provided that:

> "a. If a vacancy occurs in any one of the bargaining units covered by this Agreement and such vacancy is not filled by promotion or transfer within the group, a notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs and a copy sent to a Union divisional officer designated by the respective division.
>
> b. If such a vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department for a period of five (5) days. If the reasonable qualifications and abilities of the employees being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. 'Significant difference' shall be 'head and shoulders difference', and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences." (A. 117-118).

The grievance was processed through each of the contractually agreed upon steps of the grievance procedure (A. 141-154)

The Company's final answer in the grievance procedure, prior to the invocation by the Union of the right of arbitration, denied the grievance, but ended with the following recommendation:

> "It was evident that the Union does not have a complete understanding of test validation, establishment of standards, development of test batteries and similar information relating to the Company testing program. To that end, I am directing that a meeting for Union Officers and Chairmen be arranged to enhance their understanding of the Company's objectives in the testing area. A mutually acceptable date will be worked out prior to November 1, 1972." (A. 153).

Thereafter the grievance continued toward arbitration after the local union president termed the offer quoted above to be "completely unacceptable to the Union" (A. 154). On March 5, 1973, the Union for the first time made the following requests for information:

> "1. The actual battery of tests used in the captioned matter.
>
> 2. The method of scoring or grading and the actual criteria for finding 'acceptability' or 'recommended' or 'Not Recommended'.
>
> 3. A report on the test validation.
>
> 4. A report by the National Compliance Company which, as I understand it, consulted upon, and reviewed the Company's whole testing system or apparatus." (A. 121).

Company counsel responded to this letter on March 15, 1973, arranging a meeting between Union representatives and Company representatives to discuss and explain the entire testing procedures, but declined to release the actual test battery (A. 122).

Thereafter, on April 2, 1973, Company counsel (Mr. Houghton), its director of union relations (Mr. Ruch) and its industial psychologist (Dr. Roskind) met with

Mr. Lewis for the Union, explained the entire testing program and procedures to him, and supplied him with the Company's validation study for the Instrument Man B test battery (A. 343-353),[3] as well as a validation study of the same test battery by an outside consultant, the National Compliance Company (A. 354-378).

The Company declined to give the Union the actual test batteries, test papers or test scores of the applicants who took the test.

Two days after the April 2, 1973, meeting with the Company, the Union filed charges with the Labor Board giving rise to this case (A. 104-106).

The Tests

The Company has used aptitude tests in an attempt to predict job performance since the late 1920's or early 1930's (A. 75, 178-179). These tests do not measure current knowledge and skills relevant to the job, but rather the person's ability to learn such knowledge and skills. In 1958, a test battery was developed for the job of Instrument Man (A. 75-76; 179). In the 1956-1957 period, after the Company reviewed earlier studies by industrial psychologists of what instrument men actually do and checked with other sectors of industrial experience where similar jobs were performed, it appeared that there were four tests that had some possibility of predicting job success of the Detroit Edison Instrument Man. Out of these four, three were

[3] A test "battery" is two or more tests used in combination to arrive at a selection decision (A. 224).

picked for a validation study (A. 188-189).[4] These were the Personnel Test, the Minnesota Paper Form Board (MPFB) and the Engineering and Physical Science Aptitude Test (EPSAT) (A. 189). At that point, incumbent instrument men (1) were given the three tests on an experimental basis and (2) independently ranked by their supervisors in terms of their ability to do the various job functions of the Instrument Man job. A positive correlation between demonstrated ability to perform the Instrument Man job and higher scores on the three tests was shown to exist (A. 190).

In the 1969-1970 period, the Instrument Man battery of tests was again validated by the Company's industrial psychologists because "the technical engineers of the power plants recognized the need for some improvement in the selection test battery" (A. 344). The steps taken in that revalidation study were the following:

1. The plant engineers were instructed to arrive at a series of specific job functions of the Instrument Man, which were a representative sample of the tasks performed and which ranged from comparatively simple to complex (A. 233). Twenty-three (23) such tasks were selected and they are specified in the validation report (A. 352-353).

2. An evaluation procedure was devised whereby each of the 43 incumbents on the job, who had taken the Instrument Man battery of tests, would be rated

[4] A validation study is a systematic research study to determine whether or not there is a relationship between test performance and job performance.

by their supervisors on each of the 23 objective job tasks as to whether each could perform the task either (a) without assistance, (b) with minor assistance, or (c) with major assistance (A. 233-234; 345).

3. Using these parameters, at least two supervisors independently rated each of the incumbents on each of the 23 items. Where there was no supervisory consensus on the incumbent's performance in the 23 areas being studied, the results of such evaluations were discarded. This happened in the case of ten of the incumbents (A. 234-235; 346), leaving 33 incumbents in the study.

4. The performance figures were then correlated with the test scores. Using the three tests, the multiple correlation between tests and performance was +.73 (A. 347). The correlation coefficient measures how successful the test battery is in predicting job success. If the correlation were +1.0, the test would be perfectly predictive of job success (the high scorers would all be high performers). If the correlation were −1.0, the test would be perfectly predictive in the opposite direction (the high scorers would all be poor performers). If the correlation were 0, the test battery would be indicative of neither success nor failure on the job. The test scores would have no predictive value and their relationship to either job success or failure would be one of pure chance.

Taking the Personnel Test out of the battery, the correlation coefficient was only reduced to +.71 (A. 347). Since it added so little to the validity of the test battery, the Personnel Test was removed as a result of the 1970 revalidation (*Ibid*).

The uncontradicted testimony of the professional industrial psychologists was that a correlation coefficient of +.71 was unusually high in terms of predicting successful job performance. Thus Doctor Roskind, the Company's Director of Industrial Psychology, testified that "you very, very seldom find a correlation of a test . . . anywhere near as high as .7" (A. 238). Mr. Kanous, the Company's Director of Employee Training, testified that a +.71 correlation was "very high", and that generally, useful correlation coefficients would be in the +.3 to +.6 range (A. 206).

In addition, as a result of the 1970 revalidation, the previous three-tiered scoring of (1) "not recommended", (2) "acceptable", and (3) "recommended" was dropped in favor of a two-tiered system of "not recommended" and "acceptable", and a slightly higher cut-off score of 10.3 was determined to be appropriate (P.A. 64a). The cut-off score of 10.3 was derived from a scatter plot (A. 349) showing both supervisory evaluation of individuals in the study and their test scores. As testified to by Doctor Roskind:

> "After you've placed all this information on the scatter plot, what you do is place the cutoff score so that it will operate most effectively and you will make the least number of mistakes in predicting poor performance and in predicting good performers on the job" (A. 99).

The scatter plot showed, and the Arbitrator found, that 13 of the 16 above-average performers on the job scored 10.3 or better and that 14 of the 17 below average performers on the job scored less than 10.3 (P.A. 74a; A. 349). Stated another way, those scoring 10.3 or better had an approximately 80% chance of becoming successful instrument men, and those scoring

below 10.3 had an approximately 80% chance of becoming unsuccessful instrument men (A. 238).

The content of the Minnesota Paper Form Board and the EPSAT was not changed in any way as a result of the 1970 revalidation (A. 236).

The Minnesota Paper Form Board Test is a single undivided aptitude test that has been used for many years to predict the ability to visualize in three-dimensional space (A. 193-195).

The Company introduced into the record of the arbitration and of this case ten samples of the kind of questions appearing in the MPFB (A. 400-402).[5]

The EPSAT is an aptitude test which is divided into six parts:

1. Mathematics. This measures the applicant's facility with addition, subtraction, multiplication, division, fractions, ratios and proportions, and a small amount of algebra and geometry (A. 199). Examples of the actual type of question posed in the mathematics section of the EPSAT were introduced in the record of the arbitration and of this case and can be found at A. 384-385.

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[5] These sample questions, as well as the sample questions depicting the six part EPSAT Test, which the Company furnished the Union, were not items taken from the actual tests, but rather from a special test, the Multi Aptitude Test (MAT). This test was specifically developed for training psychology students and others and is used to demonstrate the majority of questions which appear in the MPFB and EPSAT. In cases where the MAT did not contain questions similar to several sections of the EPSAT, the Company obtained additional questions from the public domain or developed questions to illustrate the type of items found in the actual test (A. 192-193; 215-216; 379-426).

2. Formulation. This measures the facility with which a person can take a verbal problem and express it in a formula-type way (A. 199). Examples of the actual type of question posed in the formulation section of EPSAT were introduced in the record of the arbitration and of this case at A. 403.

3. Physical science comprehension. This measures aptitude for solving physics-type problems including application of physical concepts such as reflectivity, retention of heat, displacement and the like (A. 201). Examples of the kind of question posed in this section of EPSAT were introduced into the record of the arbitration and of this case at A. 403.

4. Arithmetic reasoning. This measures aptitude to reason in a deductive way (A. 202-203). Examples of the kind of question posed in this section of EPSAT were introduced in the arbitration and in this record at A. 405-413.

5. Verbal comprehension. This measures the ability to use language effectively in a physical science context (A. 203). Examples of the kind of question posed in this section of EPSAT were introduced in the arbitration and in this record at A. 380-381.

6. Mechanical comprehension. This measures the ability to apply mechanical principles of levers, gears, center of gravity, etc. (A. 203). Examples of the kind of question posed in this section of EPSAT were introduced in the arbitration and in this record at A. 391-393.

The Instrument Man battery of tests was again studied—together with other job test batteries—in 1972 by an independent organization known as the

National Compliance Company (NCC). The conclusion of the NCC study was that:

> "It has been reported above that the total test battery is statistically significantly related to the two criterion variables for the job of Instrument Man. The test battery appears to be effectively selecting men who will perform better as Instrument Men" (A. 367)

The Company administers the tests to applicants with the express commitment that each applicant's test scores will remain confidential (A. 85, 445). The Company insures test and test score security by keeping the tests and test scores under lock and key in the offices of the Company's professional industrial psychologists who have an ethical commitment under the American Psychological Association's Code of Ethics* not to disclose the tests or test scores to unauthorized persons (A. 82-83, 438). Under this policy the Company's industrial psychologists do not disclose tests or report actual test scores even to members of management (A. 77, 83, 91, 127).

The 1972 Collective Bargaining Negotiations

The Company and Union engaged in collective bargaining negotiations in 1972 to negotiate a successor agreement to the 1969 agreement. At the second meeting in these negotiations on April 20, 1972—exactly four months after the Union filed the grievance concerning the Instrument Man test—the Union proposed the following to the Company:

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*The APA Code of Ethics is expressly incorporated in the statutory codes of over twenty states, including the State of Michigan. Mich. Stat. Ann. § 14.677(1)(b) (1976).

> "The Union shall be furnished copies of all tests given to employees. Union shall have the right to review all test results. All tests shall be job related and only for the job or position applicable" (A. 164).

The Company rejected this proposal on May 9, 1972, and advised the Union that acceptance of its proposal "would destroy the testing program" (A. 165). On May 18, 1972, when the subject came up again, the Company again rejected the Union's demand for the tests and test scores on the basis that nothing in the contract gave the Union a right to access to this information, but offered to have its industrial psychologists discuss with the Union the integrity of its testing program (A. 168). The Union responded that it was interested in hearing the Company's explanation of its testing program after the conclusion of negotiations. There was no change made in the 1972 contract as a result of the Union's demand for the tests and test scores. The Company did hold a meeting with the Union in the Fall of 1972 to explain its testing program in accordance with the contractual commitment that it made in the negotiations (A. 168-169).

The Arbitration

After filing the charge with the Labor Board leading to this case on April 4, 1973, the Union in preparation for the arbitration sent a memo to the Arbitrator on May 23, 1973, requesting the Arbitrator to direct the Company to furnish the Union with copies of the actual tests, or to subpoena the tests (A. 123-124).

On the same day the hearing opened before Arbitrator Jones. The original arbitration hearing took place on May 23, 24, 30 and 31, 1973.

In the course of this hearing, as noted in part above, the Company furnished the following information:

1. Its 1970 validation study.

2. The 1972 NCC validation study.

3. Explanations of the MPFB and each of the six parts of EPSAT.

4. Representative sample questions showing the type of question appearing on the MPFB and on each part of the six-part EPSAT.

Also during the course of the five-day hearing, the Company offered to turn over to the Union test scores of any employee who would sign a waiver releasing the Company psychologist from his pledge of confidentiality (A. 7).[7] Finally, the Company disclosed test scores of applicants taking the test battery without tying the score to the applicant's name (A. 279-280).

Nevertheless, on June 2, 1973, two days after the close of the original hearing, Mr. Lewis for the Union wrote the Company stating:

> "Inasmuch as I am writing you, and after much deliberation, I find I cannot withdraw my request for the actual tests, scores, and weights. While the Company has made samples for me, and I appreciate that, and while it gave scores without revealing names, I have the problem of knowing the weights in the 6 parts of the EPSAT test—the total weight of EPSAT—then the weight of Minnesota Form Board—then how the various parts fit together to form the possible apex of 15.3 in the upper limit, quite apart from the 10.3 cut off score." (A. 125-126).

[7] The Union flatly refused to determine whether the employees it represented would want their raw scores divulged to the Union (A. 44).

This request was answered by the Company on July 10, 1973, in which the Company responded affirmatively and in detail to the Union's requests concerning the battery weights and scoring mechanisms while again declining to give the Union the test battery and the scores linked with the names of the examinees (A. 127-131).

After the close of the initial hearing, the Arbitrator ruled on the Union's request and held that he lacked the power to require the Company to produce a copy of the tests and the scores achieved by applicants taking the tests (P.A. 67a). At the same time, the Arbitrator invited the Union to produce case citations demonstrating that such information should be furnished, but the Union declined to do so (*Ibid.*).

In view of the dual pendency of both the Union's charge before the Labor Board and the case before the Arbitrator, the Company and Union on August 6, 1973, jointly advised the Arbitrator of the situation, and concluded that the arbitration proceeding should not await a final decision by the Board or its enforcement by a Court of Appeals (A. 138-139).

The Arbitrator thereafter closed the hearing in the case on August 18, 1973, and rendered his decision on December 3, 1973, finding that the Company did not violate the Agreement by establishing an acceptable score on the tests as a qualification for the job, but directing the Company to re-examine employees with scores between 9.3 and 10.3 to determine whether their lower scores were offset by relevant educational or job experience (P.A. 76a).

In compliance with the award, the Company re-examined three of the Monroe applicants who had scored between 9.3 and 10.3 on the tests and subsequently promoted one such employee who had a background which might tend to offset his failure to achieve the 10.3 score, but again rejected two others (P.A. 39a). The Union protested the failure to promote the Monroe applicants who were rejected and a supplemental hearing was held before the same Arbitrator on July 18, 1974, to determine whether the Company had complied with the original award. The transcript of that hearing is also included in the record in this case (A. 331-342). In a supplemental decision the Arbitrator found that the Company had complied with the award (P.A. 77a-87a).

In the course of the Arbitrator's original decision based on four days of hearing on the issue of testing, he made several findings not disputed by the Administrative Law Judge, the Board, or the Court of Appeals, which are relevant to the disposition of this case:

1. He found that the Company had the right under the contract to establish minimum reasonable qualifications for the job of Instrument Man (P.A. 70a-71a).

2. He found that:

> "There is no doubt that the Company has established and maintained the right to use tests as a measure of an employee's qualifications—the Union concedes this point." (P.A. 71a).

3. He found that:

> "[T]he test [battery] is what the Company claims it to be—a reliable valid test with a correlation coefficient of .72. There is also no question that it

> is a 'fair test' in the sense that its administration and scoring have been standardized." (P.A. 72a-73a).

4. He found that:

> "There is no doubt that as tests go, this particular test has a high degree of validity. The way in which it was developed and is used also overcomes many of the objections raised by arbitrators and industrial relations practitioners; that is, the test was developed especially for this job (job related), and has been properly validated. In addition, and very important, the instant test is not used to compare one employee against another in terms of scores attained . . . This problem is eliminated by reporting scores in terms of 'not recommended' and 'accepted'." (P.A. 73a).

5. Addressing himself particularly to the Union's attempt to attack the test by attacking individual sample questions or items on the test as being themselves not related to the work of the Instrument Man, the Arbitrator stated:

> "The Union questioned the validity of the test by reference to the type of questions asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning of the face validity of the test. Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance." (P.A. 72a).

6. Additionally and most significantly, he found that:

> "In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test" (P.A. 72a).

In conclusion, the Arbitrator found that the attainment of a 10.3 score created a presumption of "significant difference" as provided for in Article VIII, Section 38, of the parties' agreement, over those failing to obtain such a score unless those scoring between 9.3 and 10.3 had relevant educational or job experience which might tend to offset their failure to achieve the 10.3 score.

The Unfair Labor Practice Case

The hearing in the unfair labor practice case took place on September 23, 1974. As noted above, the entire 690-page transcript of the original arbitration case, as well as the transcript of the supplemental hearing before the Arbitrator, were introduced in the record before the Administrative Law Judge.

In the proceeding before the Administrative Law Judge the Company made two further and significant efforts to be responsive to the Union's requests and the General Counsel's Complaint. At the outset of that hearing, the Company's counsel stated:

> "The Company has offered to do two things to appease the Union in this case. One, our position is we would be willing to disclose these tests to a qualified industrial psychologist for his perusal, for a determination on behalf of the Union. We have also indicated to Mr. Lewis, the spokesman for the Union, that we would permit him to take the test himself" (A. 6)

In addition, at the hearing two professional psychologist witnesses—one of them an outside consultant, Dr. Marvin Dunnette—testified without contradiction that disclosure of the actual items on the test battery to the

Union would not be useful in determining the validity or fairness of the test battery (A. 50-51, 71-72, 79).

The Board's Administrative Law Judge in a decision rendered on January 29, 1975, ordered that the battery of tests and actual test sheets not be disclosed to the Union directly, but rather to a qualified psychologist of the Union's choice who would be free to consult with the Union and show the Union the tests and test sheets to the extent necessary to process a Union grievance over promotion to the Instrument Man classification, but not to permit the Union to copy the test or otherwise disclose the test to those who may have taken the test in the past or might take it in the future. He further ordered that the Company disclose to the Union directly the test scores achieved by each specifically named employee to whom the test battery was administered.

Inasmuch as the Company at the outset of the unfair labor practice hearing had offered to show the battery of tests to a qualified psychologist of the Union's choice "to appease" the Union, the Company did not except to that portion of the decision of the Administrative Law Judge, but did except to his proposed order that the raw test scores of employees to whom the battery of tests had been administered be turned over directly to the Union. The Union excepted to the requirement that the test battery be disclosed to a qualified psychologist of the Union's choice rather than to the Union directly.

The Board in a two to one decision upheld the Union exception and ordered that all the test materials in-

volved be disclosed to the Union directly. The Board concluded that:

> "While we are making the tests available directly to the Union, we shall, in order to preserve their future utility, impose the same restrictions upon their use by the Union as recommended by the Administrative Law Judge" (P.A. 16a).[8]

Former Member Kennedy would have affirmed the decision of the Administrative Law Judge in its entirety, noting that:

> "There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how the Board can enforce its exhortation not to copy or disclose the tests" (P.A. 17a).

The Decision of the Court of Appeals

The majority decision of the panel of the Court of Appeals enforced the Board's order in all respects.

In answer to the Company's concern about dissemination of the tests by turning them over to the Union directly, the majority merely referred to the provision

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[8] Specifically, the restrictions imposed by the Administrative Law Judge were the following:

> "[T]he Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past or may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to Respondent" (P.A. 55a-56a).

in the Board decision quoted above purporting to impose a restriction on the dissemination of the test materials. In answer to the Company's concern that turning raw test scores, linked with the names of the persons taking the tests, and actual test papers of the applicants directly to the Union would involve the Company in a breach of an express pledge given to each of the persons taking the tests that the results of the test would not be disseminated, and subject such persons to needless embarrassment, humiliation and harassment, the majority of the Court simply cited its decision in *General Electric Co.* v. *NLRB*, 466 F.2d 1177 (6th Cir. 1972), holding that wage information received by the Company from other companies on a confidential basis and used as a part of a wage survey to determine rates of pay for employees of the Company must be disclosed to the Union.

Finally, in answer to the concern of both the Company and the American Psychological Association (herein referred to as APA) as *amicus curiae* that disclosure directly to the Union of the test materials would involve the Company psychologists in a violation of their professional ethical code, the majority of the Court simply found that "the principles which underlie the National Labor Relations Act are paramount in this case" (P.A. 8a).

Circuit Judge Weick filed a dissenting opinion in which he concluded that the Board had not followed the standard used in *Kroger Co.* v. *NLRB,* 399 F.2d 455 (6th Cir. 1968), of recognizing and adequately protecting each of the conflicting interests involved. He found that the Board order recognized only the interest of the Union and that its order "constituted a gross abuse of discretion" (P.A. 12a).

Judge Weick pointed out the several Company efforts to accommodate the Union's interest in the Company's test program and concluded that such information was "sufficient to permit the union to process adequately the grievance before the Arbitrator, or to perform its duties under the collective bargaining agreement" (P.A. 11a). To the majority opinion's claim that dissemination of the test materials was adequately protected by the Board's Order, Judge Weick found such reasoning to be "really naive" and quoted, with approval, former Member Kennedy's analysis in support of this conclusion (P.A. 11a).

In addition, Judge Weick found that disclosure of the test materials would involve the Company psychologists in a violation of the Code of Ethics of the APA, which has been recognized by the statutes of the State of Michigan, and that disclosure of the test scores and test papers linked to the name of the person taking the test constituted an invasion of a confidential and privileged relationship between the psychologists and the examinees.

SUMMARY OF ARGUMENT

1. Disclosure to the Union of the Test Materials Would Destroy the Validity and Future Usefulness of the Tests.

The disclosure of tests and test scores to unauthorized, non-professional persons is in contravention of Standards I5 (tests) and J2 (test scores) of the American Pychological Association's "Standards for Educational and Psychological Tests and Manuals", which prohibit disclosure of aptitude tests and test scores to unauthorized persons because prior knowledge of specific test items by individuals who are to take the test in the future destroys the validity of the test. These

APA standards have in turn been incorporated into the Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures" promulgated under Section 703(h) of the Civil Rights Act of 1964, which permits employers to give and act upon the results of professionally developed ability tests, provided that the tests are not used to discriminate. The EEOC Guidelines on Testing, and particularly their incorporation of the APA Standards have, in turn, received the explicit approval of this Court on at least three occasions. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-31 (1975); *Washington* v. *Davis*, 426 U.S. 229, 250, fn. 16 (1976).

The Court of Appeals for the Second Circuit has held that production of aptitude tests to members of an affected class of minority employees who would be taking the test in the future in competition with others would not be approved because advance inspection of the tests by the class members would place all others at a competitive disadvantage. *Kirkland* v. *Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975).

Because of the "unique character" of aptitude tests, the Labor Board in its forty-three year history of administration and interpretation of Section 8(a)(5) has never before required employers to furnish unions with test questions, and on at least one occasion its General Counsel has even refused to issue a complaint seeking the production of test questions on the basis that advance inspection of the test would permit their content to be widely disseminated and thus impair the usefulness of the test. *International Telephone & Telegraph, Federal Division*, Case No. SR 657, 46 LRRM 1387 (1960).

The invention by the Labor Board of a "restriction" seeking to limit the Union's dissemination of the tests to other employees who may take the tests in the future is unworkable and unenforceable. Once control of the tests passes to a person or persons with no professional obligation against disclosing the tests to others, the security and thus the validity of the tests have been hopelessly compromised in accordance with the APA Standards. The "restriction" places an impossible burden on the Company of seeking to police the "restriction". Even if the Company were able to detect a deliberate violation of the "restriction", it has no independent right to seek contempt proceedings in the Court of Appeals since that right resides solely with the Labor Board. It is also highly doubtful whether a Union which violates the "restriction" could be found in contempt at all since the order of the Labor Board runs against the Company and not the Union, which was not even a party to the enforcement proceeding in the Court of Appeals. Even if the Company were able to detect a deliberate violation of the "restriction" and even if the "restriction" were in some way enforceable against the Union, there is no adequate remedy for the violation since the Company's tests would be invalidated and it would take years to validate a new test battery.

Even if the Union did not deliberately or inadvertently violate the "restriction", the disclosure of the tests to "the Union" invalidates the tests since "the Union"—however that term is construed—consists of employees who change on a regular basis due to Union elections and who well might take the tests in the future. Additionally, disclosure of the test questions could result without a violation of the "restriction" from a

public arbitration or court proceeding in which the questions were revealed.

For all these reasons it is simply naive, as dissenting Judge Weick found, to believe that a hortatory "restriction" will prevent intentional or inadvertent disclosure of the tests to those who might take the tests in the future.

2. Disclosure to the Union of the Test Materials Is of No Probable Relevance or Usefulness to the Union in Pursuing Its Statutory Functions.

Even under the broad "discovery type standard" approved by this Court in *NLRB* v. *Acme Industrial Company,* 385 U.S. 432 (1967), the Company had no obligation to furnish the Union the test battery and test scores linked to the names of the examinees, because the materials have no probable relevance or usefulness to the Union.

In the course of this proceeding the Company furnished the Union with what dissenting Judge Weick found was a "wealth of material" on its testing program. This included furnishing the Union with two validation studies done on the test battery, written explanations of the tests and scoring weights of the tests, generous samples of test questions on each of the tests and subparts of the EPSAT Test, and the test scores of all applicants without linking the applicant's name to the score. In addition, the Company offered to disclose to the Union the score of any applicant willing to have his score divulged and to disclose the test battery to a qualified psychologist of the Union's choice.

In light of the above information, the three professional psychologists testifying in this case concluded

without contradiction that disclosing the test battery itself to the Union would not be relevant or useful to the Union in determining the validity of the test battery. In addition, the Arbitrator who decided the underlying arbitration case concluded that providing the Union with the actual test battery would "prove nothing" and that "the Union's position was not damaged in any way by lack of access to the test".

With respect to the test scores linked with the name of the applicant, there was absolutely no evidence in the record that such information was of any probable relevance or usefulness to the Union. Contrary to the Board's finding, the Arbitrator did not conclude that the Union needed all the scores linked with the names of all the applicants to police the agreement. Rather, he concluded that the Company had discharged its obligation by disclosing to the Union the names of the three applicants who had scored between 9.3 and 10.3. There are, moreover, compelling reasons against disclosure of test scores. All test applicants are given an express pledge of test score confidentiality before they take the test and disclosure of actual test scores would not only breach that pledge but would subject those scoring low on the test battery to needless embarrassment and humiliation. In addition, there is an emerging Congressional recognition and protection of the right of individuals against disclosure of private and personal information such as their aptitude test scores.

3. A Proper Balance of the Conflicting Interests Involved, as Well as Overriding Principles of Federal Labor Law, Require That the Test Materials Not Be Disclosed to the Union.

The Court of Appeals failed to apply the principle established by this Court in *NLRB* v. *Truitt Mfg. Co.*,

351 U.S. 149, 153-54 (1956), that "the inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met", as well as the principle established by this same Court of Appeals itself in *Kroger Co.* v. *NLRB,* 399 F.2d 455, 457 (6th Cir. 1968), that "the critical problem appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here".

In the present case, if there were any real analysis of "the circumstances of the particular case" or any real balancing of the "conflicting interests" involved, it would have become obvious that in balancing the lack of probable relevance or usefulness of the test materials to the Union with the probability of invalidation of the Company's entire testing program by disclosure of the materials that the balance in the circumstances of this particular case should have been struck in the Company's favor.

Two other policies of federal labor legislation support this balance. First, the policy favoring final and binding resolution of contract disputes by arbitration as set out by this Court in the *Steelworkers Trilogy* is served by not disclosing the test materials since the Arbitrator ruled that the materials were irrelevant to his resolution of the dispute. Thus, far from aiding the arbitral process, as was found to be the case with the information sought by the Union in *NLRB* v. *Acme Industrial Company,* 385 U.S. 432 (1967), the information in the present case has already been found to be irrelevant to the arbitration process. Secondly, this Court has had previous occasion to remind the Labor Board that it should construe the Act in a manner consistent with other equally important Congressional ob-

jectives and should not pursue the policies of the Act so single-mindedly that it conflicts with other legislation. *Southern Steamship Co.* v. *NLRB,* 316 U.S. 31, 47 (1942); *Emporium Capwell Co.* v. *Western Addition Community Org.,* 420 U.S. 50, 66 (1975). The novel construction of Section 8(a)(5) of the Act by the Labor Board here clearly conflicts with the equally important Congressional objective of assuring that tests used in job selection decisions be valid and nondiscriminatory.

ARGUMENT

I

Disclosure To The Union Of Job-Related Aptitude Tests, Test Scores Linked With The Name Of The Applicants And Test Sheets Of Applicants Would Destroy The Future Validity Of The Tests

The argument made in this section of the brief assumes, solely for purposes of argument, that disclosure of the test materials to the Union in connection with the arbitration proceeding had some degree of probable relevance and usefulness to the Union in carrying out its statutory obligations, and would, thus, arguably be subject to production under the "discovery-type standard" enunciated in *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432 (1967), were it not for the unique character of the test materials involved and the Company's inability to continue a valid testing program under Title VII of the Civil Rights Act of 1964, while at the same time disclosing the test materials to the Union. In Part II of this Argument, the issue of the irrelevance and lack of usefulness to the Union of the test materials at issue here will be addressed under the standard set by this Court in the *Acme* case.

1. The Violation of EEOC Guidelines on Testing Inherent in Disclosure of the Test Materials to the Union

As shown in the petition for certiorari in this case, testing is a major employee selection device in both American industry and in the federal government itself (Petition, pp. 9-10). Disclosure to unions of tests and test sheets of named applicants will result in a widespread invalidation of testing programs as a selection device for applicants for employment as well as for selection of existing employees to fill jobs of admittedly critical importance, as is the case here. As dissenting Judge Weick correctly observed, "It's [the Company's] testing program has been nullified by the action of the Board" (P.A. 11a-12a).

This invalidation occurs because disclosure of the test materials to "the Union" naturally leads to disclosure and, therefore, foreknowledge of the actual items on the tests by some or all of the persons who will take the tests in the future, as will be demonstrated shortly in this brief.

Assuming, however, for the moment, the premise of foreknowledge of the actual test items by those who are to take the test in the future by disclosure of the tests to "the Union", the conclusion of the practical and legal invalidation of the testing program is easily established and was not really controverted by the Board or the Court of Appeals.

As a practical matter, it is evident that such foreknowledge will result in a situation where the high scorers on the test will reflect not the aptitude of the examinees to perform the job, but rather the extent of

their familiarity with the items on the test and their ability to memorize the "right" answers.

As a legal matter, such foreknowledge invalidates the test battery under civil rights laws, particularly Title VII of the Civil Rights Act of 1964. Section 703(h) of that Act permits employers to give and act upon the results of professionally developed ability tests, provided that the test or its administration is not designed, intended or used to discriminate. Under the mandate of Section 703(h), the EEOC has developed "Guidelines on Employee Selection Procedures",[9] which begin with the proposition that:

> "properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies . . . ." 29 C.F.R. § 1607.1 (P.A. 88a-89a).

This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), approved this general philosophy on testing by noting that:

> "Nothing in the Act precludes the use of testing or measuring procedures; *obviously they are useful.* . . . Far from disparaging job qualifications

[9] On December 30, 1977, the EEOC, Civil Service Commission, Department of Justice and Department of Labor jointly issued a notice of proposed rulemaking on "Proposed Uniform Federal Guidelines on Employee Procedures", which are still in the rulemaking process. The proposed guidelines state that:

> "These guidelines are based upon, combine, and supersede all previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, the practical experience of the agencies, as well as standards of the psychological profession. These guidelines are intended to be consistent with existing law" Sec. 1(c).

> as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract" 401 U.S. at 436. (Emphasis added).

Under the heading of "Minimum Standards for Validation" of tests, the Guidelines state that evidence in support of a test's validity must be based "on studies employing generally accepted procedures for determining criterion related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by the American Psychological Association . . ." 29 C.F.R. § 1607.5 (P.A. 92a-93a).[10]

Standard I5 of the APA Standards referred to in the EEOC Guidelines cited above and the proposed joint agency guidelines states the following:

> "I5.The test user shares with the test developer or distributor a responsibility for maintaining test security.
>
> Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true

[10] The proposed joint agency guidelines referred to above state the same proposition in the following manner in the section entitled "General Standards for Validity Studies":

> "These guidelines are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974 (hereafter 'APA Standards')) and standard textbooks and journals in the field of personnel selection". Sec. 5(c).

> score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures could destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test". Standards for Educational & Psychological Tests, published by the American Psychological Association (1974). p. 67.

It is undisputed on this record that the test battery in issue is not a test for achieved skill, but rather an aptitude test where "prior knowledge of test items could destroy validity." It is also undisputed that the individual questions on the Instrument Man test battery are identical each time the test is administered and that there are no variations or substitutions of test items (A. 78).

Standard J2 of the same APA Standards cited in the EEOC and proposed joint agency guidelines states the following:

> "J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.
>
> Comment: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject or to hire or to reject, or to certify or not to certify, must have the interpretation. One

> useful (and unanswered) question is whether such a person who lacks the training necessary for the interpretation of scores should be given that training or should be given only the interpretations of scores." Id. at p. 68.

By turning over the test scores to unions and thereby to the employees represented by the unions, access to the test scores is thereby given to "curious peers".

In addition, the EEOC Guidelines on testing expressly provide for test score security. Section 1607.5 (b)(2) states that:

> "Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures" (P.A. 94).

This Court on at least three recent occasions has held that the EEOC Guidelines on Employee Testing are entitled to "great deference" and to be regarded as "expressing the will of Congress." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 430-31 (1975); *Washington* v. *Davis,* 426 U.S. 229, 250 n. 16 (1976). In the *Albemarle* case the Court expressly noted with approval that the EEOC Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association", 422 U.S. at 431.

One Court of Appeals already has held that it is inappropriate to disclose tests to employees who may take the tests in the future in competition with others. In *Kirkland* v. *Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), a class of minority applicants

for promotion to a position within the New York State Department of Correctional Services, filed a civil rights complaint under 42 U.S.C. 1981 and 1983 challenging, *inter alia,* a State Civil Service examination which the State used to determine the successful applicants for the job. The Second Circuit agreed with the District Court that the examination was not job related and had a discriminatory impact on minorities, but reversed the District Court's order requiring that any new test for the position in question be furnished by the State to the minority applicants for their prior review. The Court held:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiffs' expert, his order should so provide; and proper steps should be taken to insure confidentiality" 520 F.2d at 427.

From the foregoing, therefore, it is evident that disclosure of the actual tests and the test scores of individuals taking the tests to unions and employees represented by unions, who have no professional obligation not to publicize the tests and test scores, will invalidate the tests both as a practical matter and under Title VII of the Civil Rights Act. Invalidation of testing as an employee selection device, both in private industry and government, may well lead to unqualified persons being placed on jobs of critical importance, such as the job in question in the present case, to the detriment of the employees, employer and the public at large.

The Company involved in this case is a large public utility—a classic example of a "business affected with a public interest" (*Munn* v. *Illinois*, 94 U.S. 113 (1877)). As such it has a duty to its consumers and the public to take all reasonable precautions to determine that only qualified personnel perform important jobs such as the job involved in this case. Validated, job related testing is a business necessity essential to carry out the Company's duty to place only qualified employees on admittedly "critical" jobs such as the job involved here.

The uncontradicted record in this case shows that the Company spent "tens of thousands of dollars" (A. 128) in validating the instrument man battery of tests to the exacting requirements of the EEOC Guidelines and the APA Standards.[11] In addition, the Company's own validation study was corroborated by a later validation study by an outside consultant, the National Compliance Company. The result of these considerable and expensive efforts was upheld in the arbitration award in which the distinguished and experienced labor-management Impartial Arbitrator Dallas Jones found that the Company had a contractual right to use tests as a selection device for the Instrument Man job and that the tests used had a high degree of validity (P.A. 72-73a).

In short, the test battery involved in this case scrupulously adheres to the Court's seminal observation in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436

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[11] See pp. 8-12 of this brief for a detailed description of how the Company determined the criterion-related validity of the Instrument Man test battery.

(1971), "that any tests used must measure the person for the job and not the person in the abstract".

If, therefore, the extreme and novel judicial construction of Section 8(a)(5) of the National Labor Relations Act by the Court below is not reversed, this Company's substantial and successful efforts to validate its Instrument Man test battery under the EEOC Guidelines and APA Standards, as approved by this Court, will have been completely undermined. It is apparent that any such rule would not be limited to the Detroit Edison Company, but would adversely affect all testing programs administered by private and public employers.

In the over forty years of enforcement of the National Labor Relations Act, this is the first case in which the Board has construed Section 8(a)(5) of the Act to impose a requirement on employers to disclose to unions job related aptitude tests and test sheets and scores by named applicants. Indeed, in the only previous reported case, the Board's General Counsel had the common sense to refuse even to issue a complaint on a union charge seeking production of actual tests under Section 8(a)(5) of the Act. *International Telephone & Telegraph, Federal Division,* Case No. SR 657, 46 LRRM 1387 (1960). In this case the Board's General Counsel agreed with the Company's contention that the specific items on the tests had a "unique character" and that:

> "[W]hile it [the Company] would bargain concerning the general subject of the tests, it would not furnish specific test questions, since advance inspection thereof would permit their content to be widely disseminated and thus impair the usefulness of the test."

Thus, well before the passage of the Civil Rights Act of 1964 and the EEOC Guidelines on testing, the Board's General Counsel understood that tests had a unique character and that their disclosure to a union would permit them to be widely disseminated and impair their usefulness.

2. The Inefficacy of the "Restriction" Approved by the Court of Appeals in Preventing the Dissemination of the Test Materials to Unauthorized Persons

The Board's opposition to the petition for certiorari does not appear to challenge the proposition that tests and test sheets and scores that are divulged to unauthorized parties result in invalidation of the tests. Rather, the Board claims that the "restriction" invented by the Board and approved by a majority of the Court of Appeals will prevent unauthorized disclosure of the tests [12] to those who have taken the test in the past or who may take it in the future. This was the view that dissenting Judge Weick termed "really naive" (P.A. 11a).

The reasons why this view is naive are the following:

1. A violation of the copying and dissemination provisions in the Board opinion (no protective provision appears in the Board's Order) would be most difficult, if not impossible, for a company to enforce and police once it has given a union the test materials as required by the Board order. At that point it has lost

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[12] It is to be noted that the "restriction" is applicable only to the test battery and not to the test scores. Under the Board order as enforced by the Court of Appeals, the Union could publish the scores achieved by the examinees and distribute them generally.

control over the materials, and "test security" in accordance with Standard I5 of the APA Standards quoted above and the EEOC Guidelines incorporating those standards has been breached.

2. There is a built-in ambiguity with respect to exactly what specific individuals comprise "the Union" to which the Board and Court have ordered the Company to divulge the tests and test scores. Is "the Union" the individuals who comprise the executive officers of the Union, its Executive Board, its grievance committee, or is it the entire membership of this presumably unincorporated association? Obviously arguments could be made for any one or a combination of the above alternatives. Even if it were confined to the executive officers, Executive Board or grievance committee of the Union, these individuals are also members of the bargaining unit and change on a regular basis as the result of internal Union elections. The knowledge thus gained by these individuals pursuant to the Court enforced Board Order could be used by them to gain an unfair competitive edge on others not privy to the test or test scores, and thus invalidate the test, even though the Union officials themselves had not copied or otherwise disseminated the test.

3. As organizations properly responsive to their members' desires and free from professional restrictions against disclosure, unions are in a uniquely poor position to prevent intentional or inadvertent dissemination of test materials, particularly in view of the ubiquitous copying machine. Inadvertent disclosure by non-psychologists can be illustrated by the case of *Davis* v. *Washington,* 348 F.Supp. 15 (D.C. 1972), where Judge Gesell entered an order sealing the Civil Service examination in question "because it is given

on a regular basis to many federal job applicants", only to have the dissenting judge on the Court of Appeals append the entire examination to his public opinion. See *Davis* v. *Washington,* 512 F.2d 956, 967 D.C.Cir. 1975), reversed, *Washington* v. *Davis,* 426 U.S. 229 (1976). The record in this case provides an excellent example of how disclosure of the test items to employees could occur without an express violation of the "restriction". When the Union representative was given *sample* items of each of the tests involved in the arbitration proceeding, he read into the record the actual sample test item and asked the Company psychologist and employee witnesses how those questions were relevant to the Instrument Man job (See, e.g., A. 261, 286-289, 293, 328-330). Presumably, if the Union were given the *actual* test items the Union representative would in like manner read the actual test items or some of them into the record for an employee response concerning relevance. Since the arbitration record is transcribed, and since all Union members presumably have access to such transcripts, disclosure of actual test questions may well occur in this manner even though the "restriction" may not have been literally breached.

4. This record clearly shows a hostility to the entire concept of testing as an employee selection device by this Union and a preference for promotion by seniority alone (A. 160-169), despite the contractual agreement of the parties to promote on the basis of seniority only where there is no "head and shoulders" difference in the qualifications and abilities of the applicants. Thus, disclosure of the test materials to the Union is not a disclosure to an impartial body with no motive to discredit testing as a selection device, but

rather is a disclosure to an avowed enemy of the concept of testing. It requries a complete suspension of ordinary common sense to assume that furnishing a Union, which is hostile to testing, the ammunition to destroy test validity will not result directly or indirectly, inadvertently or intentionally in the Union's use of the ammunition.

5. Even if the Union were found to violate the "restriction" contained in the Board's opinion, the Company remedy is speculative at best. In the first place, only the Board's General Counsel can initiate contempt proceedings, and the initiation of such proceedings is solely within his discretion. The Company has no independent right to initiate such proceedings. *Amalgamated Utility Workers* v. *Consolidated Edison Company,* 309 U.S. 261, 264 (1940). It is also difficult to conceive of a contempt proceeding being brought in the Court of Appeals against a union that (1) has not been found guilty of an unfair labor practice, and (2) was not a party to the proceedings in the Court of Appeals. Finally, it would appear that inadvertent disclosure would be completely beyond the contempt powers of the courts.

6. Even if the Union were liable in contempt for a violation of the "restriction", there is no adequate remedy for the violation, since the tests will have been hopelessly invalidated and it would take years to validate a new test.[13] The only sanction against the Union would be punitive, not remedial—a very small source of comfort to a company whose testing program has been gutted, and of absolutely no comfort

[13] The evidence in this case showed that it took seven years to validate the power plant operator test battery (A. 309-310).

to the public whose interests could well be jeopardized by the presence of unqualified persons on jobs of critical importance in the generation of electrical power."[14]

II

Disclosure Of The Test Materials To The Union Has No Probable Relevance Or Usefulness To The Union In Carrying Out Its Statutory Duties And Responsibilities In Processing The Promotion Grievances Through Arbitration

As noted at the outset of the first argument, made above, the Board had a preliminary burden of proving by substantial evidence on the record considered as a whole that disclosure of the tests and test scores linked to the name of the applicant was of probable relevance and usefulness to the Union in carrying out its statutory duties and responsibilities. This "discovery-type" standard was approved by this Court in *NLRB* v. *Acme Industrial Company,* 385 U.S. 432 (1967), where the Court found that the Company violated Section 8(a)(5) of the Act by refusing to disclose to the Union information concerning removal of machinery from the plant that had been the subject of a Union grievance and proposed arbitration proceeding.

Even applying the broad standard of *Acme* to the "unique" information sought in the present case, there was no showing of probable relevance or usefulness to the Union in obtaining the tests and test scores linked to the names of the applicants.

[14] For many of the foregoing reasons a commentator on this case concluded that the "restriction" imposed by the Board and accepted by the Court of Appeals would be ineffective in preventing dissemination of the tests. *Psychological Aptitude Tests and the Duty to Supply Information,* 91 Harvard Law Review 869, 875-876 (1978).

Any analysis of this subject must begin with the series of substantial Company efforts to be completely responsive to the Union's test information requests in a mutually satisfactory form without invalidating the testing program itself. These efforts included furnishing the Union with (1) the two validation studies done on the test battery, (2) written explanations of the tests and scoring weights of the tests, (3) some 146 samples of the types of questions found in the MPFB and each of the six subparts of the EPSAT, (4) the test scores of all the examinees without linking the examinees' name to the scores, and offering to the Union (1) to release the score of any named examinee who consented to such release, (2) to let the Union's representative take the test, and (3) to turn over the test battery to a qualified industrial psychologist of the Union's choice.

In short, the Company gave or offered to give the Union all the information it possessed concerning its instrument man test battery except for the actual tests and test sheets and scores linked with the names of the applicants. This is what dissenting Judge Weick found was the "wealth of information" on testing which he found "was, in my judgment, sufficient to permit the Union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement" (P.A. 11a).

1. The Irrelevance of the Tests

The three professional industrial psychologists who testified in either the arbitration case or Labor Board hearing each testified without contradiction that disclosure of the actual tests to the Union directly would not be helpful in determining the validity of the test

battery, and that the validity of the test battery could best be determined by disclosure of the validation studies performed in 1970 and 1972, which were provided to the Union (A. 50-51, 71-72, 79-80, 191). No expert witness for the Union or the Board's General Counsel ever disputed this fact.

The Impartial Arbitrator came to the same conclusion, holding that production of the actual test battery to the Union would "prove nothing", and that the Union's position in the arbitration case was not "damaged in any way by lack of access to the test" (P.A. 72a). Even the NCC, which revalidated the test in 1972 did not need or utilize the actual test battery in its validation study (A. 100).

The irrelevance of the actual tests themselves to the Union's statutory responsibility in processing the promotion grievances through arbitration is further underlined by what the Union did when it was furnished sample questions of each of the tests involved. The only use made of the sample items—and presumably the only use to be made of the actual test items—was to pose the samples to the Company's industrial psychologist, to incumbent Instrument Men and applicants for that job and ask them whether the sample items were "connected with or relevant to the instrument man job" (See, e.g., A. 261, 286-289, 293, 328-330). That series of questions and answers, however, is irrelevant since it is admitted, as found by the Administrative Law Judge, that:

> "These tests are not designed to test the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently" (P.A. 22a).

Thus, for example, it is evident that a Company Instrument Man may not need as a part of his substantive knowledge in performing the Instrument Man job to know which way an airplane will turn if one of its two engines is out (see sample 9 on the Mechanical Comprehension subpart of EPSAT, A. 393). A layperson might well conclude that the answer to that question was not "connected or relevant to" the instrument man job since Instrument Men do not work on airplanes. Since, however, the test is not designed to measure job knowledge, but rather to determine aptitude to perform the job, there is no necessary direct relationship of each test item with the day-to-day work of the Instrument Man. Thus, disclosure of the test items to the Union to obtain lay opinions about the relevancy of the specific test items to the Instrument Man job when no such direct relevance necessarily exists is neither relevant nor useful to the Union in the exercise of its statutory rights.

Despite the foregoing, the Administrative Law Judge, with the Board's approval, held that while production of the actual tests might not be necessary to determine the test's validity in predicting employee success on the job, it might be necessary for the following reasons:

> "To inform the employees, or their representatives, whether the tests are truly job related or contain objectionable distortions . . . whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut Respondent's contract commitment to promote by seniority where there is no 'significant difference' between the 'reasonable qualifications and abilities' of the applicants for promotion" (P.A. 47a).

But the conjecture of the Administrative Law Judge that the battery may contain "distortions", "built-in bias" and be "discriminatory"—whatever those generalizations mean—is at war with the uncontradicted record that there is a demonstrated high correlation between the good performers on the tests and good performers on the job and the decision of the Arbitrator that the test battery was a "reliable valid test" which had a "high degree of validity". If the tests had "distortions", "built-in bias" or were "discriminatory", that obviously could not be the case.

If the problem posed by the Administrative Law Judge is one of advising the employees or their representative of the *nature* of the items on the Instrument Man test battery so that they might better know the "criteria required for promotion" (P.A. 48a), the Company has already done this by explaining to the Union in some detail the nature of both the MPFB and the six-part EPSAT, together with the furnishing of 146 sample questions closely corresponding to the kind of actual questions on each portion of both tests.

The Court of Appeals simply brushed off the Company's relevance argument in the following manner:

> "*Without actually contesting the finding that the tests, answer sheets and scores are relevant,* Detroit Edison argues, in effect, that the circumstances of this case are such as to require that the tests and answer sheets be delivered only to a qualified pychologist" (P.A. 5a) (Emphasis added).

The italicized portion of the above quote is simply erroneous factually. In its brief to the Court of Appeals, as well as in its petition for rehearing *en banc,* the Company argued strenuously under separate head-

ings that the tests and test scores linked with the name of the applicants were irrelevant (Co.Br. to Sixth Circuit Court of Appeals, pp. 26-33).

The Board seeks to avoid the relevance argument on its merits by claiming that the Company's failure to file an exception to the decision of the Administrative Law Judge ordering the Company to disclose the tests to a qualified psychologist of the Union's choice constituted an admission by the Company of the probable relevance and usefulness of the information to the Union.

This stilted reasoning overlooks the fact that the decision of the Administrative Law Judge on the issue of the tests (as opposed to the test scores) was no more than what counsel for the Company offered to do at the outset of the hearing as yet another compromise expressly "to appease" the Union. There was, therefore, no practical reason for the Company to file an exception to the order to disclose the tests to a professional psychologist. The Board has now seized on the last of a series of compromises offered by the Company simply "to appease" the Union, which was accepted by the Administrative Law Judge without Company exeeption, as an admission by the Company of relevance. Worse still, the Board now argues that when it upset that compromise and ordered the Company to disclose the tests to the Union directly, it thereby finessed the Company's further right to argue relevance to the courts. The absurd result of the Board's reasoning is that either the Company should not have offered the compromise or it should have filed an exception to this aspect of the decision which was deemed favorable to its interests on the possibility that the Board might

upset the compromise and order disclosure of the tests to the Union directly.

2. The Irrelevance of the Test Scores Linked with the Names of the Applicants

It will be recalled that during the arbitration proceeding the Company furnished the Union with the raw test scores achieved by each applicant who took the tests, but did so without linking the name of the applicant with his score.[15] The Company did this because it agreed with the Union that the scores themselves might be relevant. If, for example, twenty persons took a test with a 10.3 cutoff score, it might be relevant for the Union to know if a large majority of the twenty were clustered just above or just below the 10.3 score (thereby permitting an argument that there was very little difference in the applicants). Other arguments based on the scoring spread could be made. What this record totally lacks, however, is any evidence supporting the relevance of linking the applicant's name with the score he achieved.

The only reference to the alleged relevance of the scores linked with the names of the applicants in the decision of the Administrative Law Judge was the following:

> "Contrary to Respondent's contention, the arbitrator, who passed on the merits of the grievances, stated, during the reopened hearing, after his initial decision, that, in his opinion, the Union could not adequately 'police' the contract without the

[15] In addition, the Company offered to release the test scores of any employee who indicated his willingness to have his test score divulged.

> information. The arbitrator, in fact, directed Respondent to reconsider its selection process, in part, based upon the scores achieved by the applicants'' (P.A. 49a).

The Board accepted this finding without comment, even though the Company filed a specific exception to the relevance finding, and, as noted above, the Court of Appeals erroneously found that the Company did not "actually" contest the relevance finding on the test scores (P.A. 5a).

The reference in the Administrative Law Judge's opinion to the Arbitrator's statement in the reopened arbitration proceeding is highly misleading. The statement referred to was not a ruling, but rather the beginning of a colloquy between counsel and the Arbitrator directed toward ascertaining whether the Company had properly implemented the original award directing that those scoring between 9.3 and 10.3 be re-examined. The Arbitrator was inquiring how those individuals could be re-examined if their scores were not divulged. Counsel for the Company agreed that the names of the three individuals who scored between 9.3 and 10.3 should be disclosed, and stated that he proposed to call the responsible Company witnesses who would testify concerning the three named individuals who scored between 9.3 and 10.3. He then stated that he believed that this was "sufficient proof" (A. 338). The Arbitrator responded:

> "I think I would agree with that, Mr. Houghton. If we could have the Detroit Edison employee who is responsible for that activity testify that these names do go with these scores, then I will have to accept that as reliable evidence" (A. 338)

The names of the individuals scoring between 9.3 and 10.3 were then disclosed (A. 341-342). In his supplemental decision, the Arbitrator did not rule that the Union was entitled to the test scores of all named applicants. He ruled that:

> "The Company, for the purpose of the instant hearing, did disclose the names of those individuals at the Monroe Power Plant who scored between 9.3 and 10.3. The actual score received by each individual was not disclosed; however, this is not of such importance as to preclude a review of the Company's action in implementing the Award. Regardless of the score an individual attained in the range between 9.3 and 10.3, it is, under the terms of the Award, his qualifications *other than test score* which became of decisional importance" (P.A. 81a) (emphasis added).

It is, therefore, plainly erroneous to state that the Arbitrator held that all scores linked with the names of all the applicants had to be disclosed to the Union. All he held was that the Union was entitled to know the names of the applicants scoring between 9.3 and 10.3, and the Company complied with this holding.[16]

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[16] The Board is mysteriously selective in its reliance on the Arbitrator's opinion and award. The Arbitrator's written holding that providing the Union with the test battery would "prove nothing" and that the Union's position in the case was not damaged in any way by lack of access to the tests is simply ignored, while controlling weight is given to some ambiguous remarks made on test scores at the beginning of a colloquy which ultimately resulted in the Arbitrator's concurrence that the Company had discharged its obligations on disclosing test scores linked with the names of the applicants by having its industrial psychologist testify to the names of the three individuals who scored between 9.3 and 10.3 on the test battery.

The irony of the Board's misplaced reliance on remarks made by the Arbitrator in colloquy with counsel is that if he really meant that the scores achieved by each named applicant be disclosed to the Union, it would tend to undercut one of the main reasons he used in finding that the tests were proper. Thus, he ruled that:

> "In addition, and very important, the instant test is not used to compare one employee against another in terms of scores attained . . . This problem is eliminated by reporting scores in terms of 'not recommended' and 'accepted' " (P.A. 73a).

The record is thus bereft of any evidence supporting the relevance of disclosing test scores linked with names of the applicants to the Union.

The Company nevertheless submitted evidence why the test scores achieved by named individuals should not be disclosed to the Union. In addition to the breach of APA Standards and the consequent invalidation of the tests under the EEOC Guidelines by disclosure of test sheets and scores of named applicants discussed in Part I of the Argument, the record in this case showed that the Company gave a specific oral promise of confidentiality to all applicants prior to testing. That promise was that:

> "Your test scores are confidential. We will tell the Employment Department generally how you did on these tests and they may talk to Company departments about your being put in a certain job, but your test scores are kept only in our files" (A. 445).

This principle of confidentiality is not—as intimated by the Board—a device to foil the Union in its attempt

to process employee grievances. Rather, it is an emerging and far-reaching principle now firmly implanted in the federal law that there is a right of privacy for those taking psychological aptitude tests. Thus, for example, for students in federally assisted educational institutions there is an express statutory prohibition against the release of education records of such students without consent. 20 U.S.C. § 1232(g).[17] While it is true that employees of the Company are not students in federally assisted educational programs, the point is that the Company's concern is not a parochial one, involving its defenses to Union grievances over promotions, but parallels a broad Congressional concern shown for the disclosure of the same type of test scores in a federally assisted educational context.

In addition, the Company provided evidence that disclosure of test scores linked with the names of the applicants in the past resulted in harassment of the lower scoring employees who were called "stupid", "dummy" and the like, and who actually left the Company because of such harassment (A. 84).

This evidence was brushed aside by the Board and Court of Appeals. Both held that the decision in the Court of Appeals in *General Electric Co.* v. *NLRB,* 466 F.2d 1177 (6th Cir. 1972), was controlling (P.A. 7a, 53a). In the *General Electric* case, the Company declined to provide the Union with information obtained in a survey of wages paid by various companies in the survey. The results of the survey were used to

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[17] See also 5 U.S.C. § 552(b)(6), where an exemption from disclosure was created by Congress in the Freedom of Information Act for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy".

determine the rates of pay of the General Electric employees. The Company argued that it should not be required to disclose the wage data obtained by named companies in the survey because it had obtained the information from these companies on a confidential basis. The Sixth Circuit ruled that:

> "Employers cannot be allowed to collect wage information on a pledge of confidentiality to parties outside the bargaining unit under these circumstances, then turn around and deny the Union the use of that data based on its voluntary pledge" 466 F.2d at 1185.

The harm of disclosure of wage information gained on a confidential basis from employers outside the bargaining unit cannot be equated with the harm of disclosure of test scores of employees within the unit, which were gained on a confidential basis.

The Administrative Law Judge, with the Board's approval, appeared to recognize that there might be a harm or, as he termed it, "odium" in test score disclosure, but claimed that such an odium is inherent in all testing programs (P.A. 53a). That observation simply misses the point. There is no particular odium involved in generally failing to achieve a 10.3 cutoff score. That only means that the applicant scored from 0 to 10.2. But if scores linked with the names of applicants are disclosed, and a particular applicant has scored particularly poorly in relation to the other applicants, a totally unnecessary "odium" is attached to that applicant, and the record disclosed past incidents of harassment of such individuals.

* * * * *

There is a clear relationship between the two arguments made in this brief. This Court in *NLRB* v.

Truitt Mfg. Co., 351 U.S. 149 (1956), in assessing a company refusal to provide a union with information relating to the financial condition of the company in the face of a company claim of inability to afford union economic demands, held that:

> "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met" 351 U.S. at 153-154.

The Sixth Circuit Court of Appeals itself in *Kroger Co.* v. *NLRB*, 399 F.2d 455 (6th Cir. 1968), emphasized that a union's right to information under Section 8(a)(5) of the Act is not a *per se* or absolute right, but rather that it may involve a balancing of interests.

> "To us the critical problem appears to be how to recognize and how to adequately protect each of the conflicting interests that are involved here" 399 F.2d at 457.

Any such balancing of interests or examination of the circumstances of the particular case here must involve a determination of (1) the probable relevance and usefulness to the Union of the testing information involved—or the degree of such probable relevance and usefulness—in the light of the wealth of information on testing already disclosed by the Company to the Union, and (2) the invalidation or potential for invalidation of the Company's testing program under the APA Standards and EEOC Guidelines by disclosure of the test materials to the Union.

The less relevant and useful the requested information is to the Union in fulfilling its statutory requirements, as shown in Part II of this Argument, the more

the Company is entitled to protection against dissemination of the tests and test scores to prevent test invalidation, as shown in Part I of this Argument. Likewise, the less relevant and useful the test materials are to the Union, the less need there is for the Board and Court of Appeals to construct and seek to enforce a "restriction" of highly dubious efficacy.

In addition, any such balancing must take into account the strong federal labor policy favoring collective bargaining and arbitration as the preferred means of settling labor disputes arising under a collective bargaining agreement, as enunciated by this Court in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). That policy has been completely ignored by the Board and the Court of Appeals in this case. The Arbitrator expressly found that the Union's lack of access to the actual tests did not damage its position in arbitration in any way and that disclosure of the tests to the Union would prove nothing. Contrary to the finality of arbitration awards endorsed by this Court in the *Steelworkers Trilogy*, the Board and Court of Appeals have simply brushed aside the conclusion of the Arbitrator on the irrelevance of the tests. Far from serving the complementary role to arbitration envisaged by this Court in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967), the Board's processes in this case have been used to undermine the Arbitrator's role and decision. The decision also serves to undermine the collective bargaining process itself. The Union sought to obtain the tests and test scores in the 1972 negotiations. The Company successfully resisted these demands, only to have them now imposed by the Labor Board.

Finally, in any balancing of the interests involved, this Court has had previous occasion to remind the Labor Board that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may ignore other and equally important Congressional objectives", and that it must accommodate the statutory scheme of the National Labor Relations Act to other statutory schemes. *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 66 (1975). Here the Board, with the approval of the Court of Appeals, has sought to enforce the duty-to-furnish-information requirement of Section 8(a)(5) of the Act so single-mindedly—even though the information is of no relevance or barely marginal relevance—that it has totally failed to accommodate the equally important Congressional objective of insuring that tests used in employment selection decisions be valid and job related.

CONCLUSION

For the above reasons the Company respectfully requests that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

JOHN A. MCGUINN
FARMER, SHIBLEY, MCGUINN & FLOOD
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

LEON S. COHAN
2000 Second Avenue
Detroit, Michigan 48226